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Supreme Court of the United States

OCTOBER TERM, 1958

No. 525

ARNOLD WILLIAM LEIFER,
GEORGE FREDERICK CARNES
and JOHN HENRY McFARLAND, Petitioners

v.

UNITED STATES OF AMERICA

Joint Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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HAYDEN C. COVINGTON
124 Columbia Heights
Brooklyn 1, New York

Counsel for Petitioners

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No.

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Joint Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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TO THE SUPREME COURT OF THE UNITED STATES:

Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Sixth Circuit affirming the judgments of conviction of Leifer by the United States District Court for the Northern District of Ohio, Eastern Division, and of Carnes and McFarland by the United States District Court for the Eastern District of Kentucky, for violation

of the Universal Military Training and Service Act and sentencing each to the custody of the Attorney General.

OPINIONS BELOW

The Court of Appeals filed no written opinion in any of these cases. The judgments containing the reasons for affirmance in the cases are printed as Appendices A, B and C to this petition, *infra*, pages 37-40.

JURISDICTION

The judgments of the Court of Appeals were entered on October 22, 1958. (See Appendices A, B and C, *infra*, pages 37-40.) The time for filing this petition expires November 21, 1958. This petition for writ of certiorari is filed within said time. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1). (See also Rules 37(b) (2) and 45(a), Federal Rules of Criminal Procedure.) The district courts had jurisdiction under 18 U. S. C. § 3231.

QUESTIONS PRESENTED

I.

Whether the denial of the conscientious objector classification by the appeal board in each case was without basis in fact, making the final I-A classification arbitrary and capricious.

II.

Whether the final recommendations of the Department of Justice that the petitioners Leifer and McFarland be denied the full conscientious objector classification but be classified I-A-O because one of the bases of conscientious objection of each was that military service would interfere with his ministry, make the final orders void because the recommendations were arbitrary, capricious, contrary to law, misrepresentations of fact, immaterial and irrelevant.

III.

Whether in each case the order quashing the subpoena *duces tecum* illegally denied the right to use the FBI report upon the trial to prove that each petitioner had been denied procedural due process of law before the appeal board through the omission and withholding of favorable evidence supporting the full conscientious objector claim appearing in the report that was not summarized by the Department of Justice and the résumé sent to the appeal board along with the recommendation, contrary to the Fifth Amendment to the Constitution.

STATUTES AND REGULATIONS INVOLVED

Section 6 (j) of the Universal Military Training and Service Act (62 Stat. 604, 612, 622; 65 Stat. 75, 86 (50 U. S. C. App. § 456 (j))) is involved here. The pertinent part reads as follows:

> "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service,

in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * * Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * * If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Depart-

ment of Justice together with the record on appeal from the local board. * * *"

Section 1 (c) of the Universal Military Training and Service Act (50 U. S. C. App. § 451 (c)) provides:

"The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."—June 24, 1948, ch. 625, title I, § 1, 62 Stat. 604, amended June 19, 1951, ch. 144, title I, § 1 (a) 65 Stat. 75.

Sections 1622.11, 1622.14, 1626.25 (a), 1626.25 (b) and 1626.25 (c) of the Selective Service Regulations (32 C. F. R. § 1602 *et seq.*) are involved. These regulations are extensive; so they are printed as Appendix D, *infra*, at pages 41-43.

STATEMENT OF THE CASES

Petitioners seek review of judgments of the United States Court of Appeals for the Sixth Circuit affirming judgments of conviction of United States District Courts. (See Appendices A, B and C, *infra*, pages 37-40.) The judgments of the district courts were entered after trials without jury finding each petitioner guilty of refusing to submit to induction into the armed forces in violation of the Universal Military Training and Service Act. [LR 45; CMR 166-167][1]

[1] Numbers herein within brackets preceded by "LR" refer to pages of printed record in *Leifer* case. Numbers herein within brackets preceded by "CMR" refer to pages of joint printed record in *Carnes* and *McFarland* cases.

Nature of Action and History—*Leifer*

This criminal action was begun by indictment. [LR 1, 2] Leifer was charged with a violation of the Universal Military Training and Service Act (50 U. S. C. App. § 462) by refusing "to submit to induction into the armed forces of the United States after being so ordered by Local Board No. 32, Cleveland, Ohio." [LR 2] He was arraigned and pleaded not guilty. [LR 1] The case was fixed for trial on October 9, 1957. [LR 1]

Leifer caused to be issued a subpoena *duces tecum* compelling the production of the FBI report used by the Department of Justice in making its recommendation and résumé of inquiry to the appeal board. [LR 1, 3]

The trial proceeded on October 9, 1957. [LR 1] Leifer filed a written waiver of trial by jury and consented to a trial to the court without a jury. [LR 1] The Government moved to quash the subpoena *duces tecum*. [LR 1, 3-4] Leifer filed an affidavit in opposition to the motion to quash. [LR 4-9] The trial court sustained the motion to quash. [LR 1]

Evidence was received on October 9, 1957. [LR 1] Leifer filed a motion for judgment of acquittal at the close of the evidence on October 9, 1957. [LR 1, 40-41] The trial court overruled the motion for judgment of acquittal and found Leifer guilty. [LR 1] The judgment sentencing Leifer to the custody of the Attorney General was imposed on November 1, 1957. [LR 1, 45] Leifer timely appealed. [LR 45, 46] The Court of Appeals affirmed on October 22, 1958. (Appendix A, *infra*, page 37.)

Facts—*Leifer*

Leifer was born July 23, 1933. [LR 10] He registered with Local Board No. 32, Cleveland, Ohio, on July 30, 1951. [LR 10] The classification questionnaire was mailed to him on December 10, 1951, and was returned by him on December 19, 1951. [LR 10, 14] In the questionnaire he

showed that he was a minister of Jehovah's Witnesses since 1941, that he was ordained on April 19, 1942 [LR 11], and that he was employed with E. F. Donely's Sons, Inc., of Cleveland, Ohio, as a saw sharpener, twenty hours per week. [LR 12] He showed that he was graduated from high school. [LR 12] He signed the certificate that he was "opposed to participation in war in any form" and requested that he be sent the special form for conscientious objector. [LR 13]

On February 18, 1952, the local board mailed to him the special form for conscientious objector. [LR 14] This form was returned by him on March 11, 1952. [LR 14, 17] In it he certified that he was opposed to his participation in both combatant and noncombatant military service. [LR 18] He stated that he believed in a Supreme Being and he described in great detail the basis for his conscientious objections. [LR 18-22] He said, among other things, "I am a conscientious objector to such commands of Caesar. I gladly render to him the things that are Caesar's but refuse to render what belongs to God, to Caesar. Rendering military service is done unto Caesar and is contrary to God's law which requires me to take my stand as a minister with conscientious objections, notwithstanding the fact that I am not a pacifist." He added that he was "conscientiously opposed to the performance of military service and any other service as a part of the war efforts of the nations of the Devil's world." [LR 19-20]

He said he had been taught these beliefs from "the age of understanding" by his parents from the Bible. [LR 22] He explained that he relied upon the Watchtower Bible and Tract Society of Brooklyn, New York, for religious guidance. [LR 22] He outlined fully his religious belief in self-defense. [LR 22-24] He showed that his "preaching activity and study of the scriptures" were actions in his life that demonstrated the consistency and depth of his religious convictions. [LR 24] He gave information as to his background, schooling, employment,

places of residence, and that both of his parents were Jehovah's Witnesses. [LR 24-25]

Leifer stated that he was one of Jehovah's Witnesses, of which the Watchtower Bible and Tract Society was the governing body, and that he was baptized in symbol of his "desire to do the will of Jehovah" on April 19, 1942, at Cleveland, Ohio. [LR 26] He stated that this constituted his ordination ceremony as a minister. [LR 11]

Upon receipt of this special form for conscientious objector, the local board classified him in I-A on March 25, 1952. [LR 14] On receipt of the notice of classification, he requested a personal appearance, which took place on April 23, 1952. [LR 14, 15] On consideration of the evidence submitted the local board reclassified him in I-A, from which he appealed to the appeal board. [LR 15]

The appeal board referred the case to the Department of Justice on July 15, 1952, for inquiry, hearing and recommendation, pursuant to Section 6(j) of the Act. [LR 15] The Department of Justice conducted its inquiry, held a hearing and thereafter made a recommendation on November 10, 1953. [LR 30-33] The appeal board, acting on such recommendation, classified Leifer I-A. [LR 15, 34] He was thereafter ordered to report for an armed forces physical examination and, on such examination, was found to be fully acceptable, and was so informed on February 8, 1954. [LR 15]

On June 13, 1955, on request of the State Director of Selective Service, his case was reopened pursuant to Operations Bulletin No. 123. [LR 15] This bulletin commanded the reopening of the case because of the illegality of the recommendation of the Department of Justice in violation of the law. (*Sicurella* v. *United States*, 348 U. S. 385 (1955)) [LR 37]

The local board again classified Leifer in I-A on June 14, 1955. [LR 15] He was granted another personal appearance for July 18, 1955, and this was followed

by another I-A classification. [LR 16] He filed an appeal to the appeal board. [LR 16]

On February 15, 1956, his case was again referred to the Department of Justice for an advisory recommendation following inquiry and hearing. [LR 16] The first FBI investigative report of 1953 and the second of 1956 were both summarized in three short paragraphs. [LR 39] A copy of this contraction of the extensive investigative report was sent to Leifer. [LR 38-39] The statement, erroneously called a résumé, was a mere conclusion of fact that each report was favorable. There was no summary of the statements given by the witnesses interviewed. [LR 38-39]

Following the receipt of this document, mislabeled a résumé, a second hearing was conducted by the Department of Justice by a hearing officer, different from the first one. [LR 30, 35] The second hearing officer, like the first, found that Leifer was sincere, conscientious and entitled to the full conscientious objector classification because of his objection to both combatant and noncombatant military service. [LR 32, 37]

The Department of Justice, acting through its reviewing officer in Washington, D. C., overruled the second hearing officer, as it had the first one. [LR 30-33, 35-38] The Department of Justice pointed out in its recommendation that its first recommendation was illegal because it was contrary to the case of *Sicurella* v. *United States*, 348 U. S. 385 (1955). [LR 37]

The basis for the second and final adverse recommendation was that Leifer had stated to the first hearing officer in 1953 that he would not accept army hospital service "to alleviate the suffering of those injured in war" because it would "conflict with our ministerial duties in a congregation. I have obligations as an appointed servant of the Watchtower Society." [LR 36, 37-38] The Department of Justice, in complete disregard of the full statements appearing in the special form for conscientious ob-

jector [LR 18-24], concluded that Leifer "couched his objections to combatant training in terms of Biblical commands against killing" and that "his only objections to noncombatant military training and service, as expressed to the first Hearing Officer, are based upon the fact that such service would interfere with his ministerial duties." [LR 37]

The appeal board, on receipt of the recommendation of the Department of Justice, sent a copy of it to Leifer on July 30, 1956. [LR 16-17] Upon his failure to answer the letter the appeal board classified him in I-A-O on September 25, 1956. [LR 17, 40] On the return of the file to the local board, it ordered Leifer, on November 21, 1956, to report for induction on December 12, 1956. [LR 17] Leifer reported for but refused to submit to induction. [LR 17] This resulted in his indictment, conviction and the appeal to the court below. [LR 1, 2]

Nature of Action and History—*Carnes* and *McFarland*

These criminal actions were begun by indictments. [CMR 1, 2, 3] Carnes and McFarland were charged with violation of the Universal Military Training and Service Act (50 U. S. C. App. § 462) by refusing "to be inducted for service in the armed forces of the United States, a duty then and there required" of them. [CMR 2, 3] Carnes and McFarland were arraigned and pleaded not guilty. [CMR 1] The cases were tried together at one hearing on January 8, 1958. [CMR 1, 16]

Carnes and McFarland caused to be issued subpoenas *duces tecum* compelling the production of the FBI reports used by the Department of Justice in making its recommendation and résumé of inquiry to the appeal board in each case. [CMR 1, 3, 5] The Government moved orally to quash the subpoena in each case. [CMR 5] Carnes and McFarland filed extensive affidavits in opposition to the motions to quash. [CMR 6, 10, 11, 15] There was extensive argument

on the motions to quash and the affidavits in opposition thereto. [CMR 16-32] The court sustained the motions to quash the subpoenas "at this time since no witness has been called." [CMR 19] In each case Henry J. Cook, the United States Attorney, was called to produce the FBI report. The court sustained the objection to its admissibility. [CMR 25, 26, 32-35]

Evidence was received on January 8, 1958, in both cases. [CMR 16-142] Carnes and McFarland filed motions for judgment of acquittal at the close of all the evidence. [CMR 143-148, 149-153] The trial court overruled the motions for judgment of acquittal and found Carnes and McFarland guilty, stating his reasons extensively in an oral opinion. [CMR 153-162, 161-163]

A judgment and commitment was entered against Carnes and McFarland. [CMR 166-167] Carnes and McFarland timely filed notices of appeal. [CMR 167-169] The Court of Appeals affirmed on October 22, 1958 (Appendix B and Appendix C, *infra*, pages 39-40).

Facts—*Carnes*

Carnes was born January 26, 1934. [CMR 35] He registered with Local Board 52, Hamilton County, Cincinnati, Ohio, on January 28, 1952. [CMR 36] Classification questionnaire was mailed to him on January 27, 1953; he returned it on February 9, 1953. [CMR 36] In the questionnaire he showed that he was employed as a janitor for the Lutheran Church at Norwood and earned $21.10 per week. [CMR 37] He stated that he was a full-time student at high school and expected to receive a diploma from the school in June 1954. [CMR 38] He was born in Pennington Gap, Virginia, on January 26, 1934. [CMR 38] He did not indicate in Series XIV that he was conscientiously opposed to war in any form. [CMR 39]

He was classified as a student on March 4, 1953, and notified thereof. [CMR 39-40] On July 14, 1954, he re-

quested a conscientious objector form. [CMR 40] This form was filed with the local board on July 19, 1954. [CMR 41]

Carnes signed Series I (B) of the form indicating that he was opposed to both combatant and noncombatant military service, "unless my claim for exemption as a minister is sustained." [CMR 41] He believed in a Supreme Being. [CMR 41] He described in detail the nature of his belief as a conscientious objector that was superior to obligations arising from any human relation. [CMR 41-42, 50-52] He explained how he became one of Jehovah's Witnesses through study of the Bible, beginning in October 1952. He relied upon Jehovah God and the literature of the Watchtower Bible and Tract Society for religious guidance. As to what circumstances he believed in the use of force, he said that he would fight and kill under limited circumstances, "when God authorizes me to fight. I will fight in defense of my ministry and my brothers, and scripturally so." [CMR 42] He explained this belief in greater detail in attached statement. [CMR 47] He described his behavior, demonstrating the depth of his religious convictions. He said: "In January of 1954 I made a dedication devoting myself to the will of Jehovah and surely that duty is far superior to that of mankind." [CMR 42, 47] He had given public expression of his views as to conscientious objections since the latter part of 1953, having repeatedly expressed his determination "from the pulpit to the congregation of Jehovah's Witnesses." [CMR 43; 48] He provided information concerning his general background, such as schooling, jobs, residences and address of his mother. [CMR 43-44] He stated he had been attending the Watchtower Ministry School since 1953. [CMR 43, 48] He stated that his mother was Baptist. [CMR 44]

He further indicated in the special form for conscientious objector that he was a member of Jehovah's Witnesses, the governing body of which was the Watchtower Bible and Tract Society, Brooklyn, New York, that he

became a member in 1952, by studying the Watchtower publications and that in January 1954, he dedicated himself to Jehovah God. [CMR 45, 48-49] He described the statements of the religious organization, being opposed to participation in the armed forces either as a combatant or a noncombatant. [CMR 45, 49] He said: "I am neutral to the affairs of the world and cannot serve in combatant or noncombatant service of the Armed Forces." [CMR 49]

Accompanying the special form was an extensive affidavit that detailed the facts of Carnes' becoming one of Jehovah's Witnesses and acquiring conscientious objections. [CMR 50-53]

He had a preclassification hearing on request of the local board on September 8, 1954. [CMR 40] The local board made a memorandum of the hearing, showing he was a part-time minister with the Central Unit of the Cincinnati Congregation, attending all of the services and engaging in field ministry, and was conscientiously opposed to war. [CMR 52-54]

Following such hearing he was classified in I-A, and was so informed on September 9, 1954. [CMR 40] He timely appealed to the appeal board and incorporated a written record of oral evidence given at the hearing. [CMR 40, 55-57] His file was transmitted to the appeal board on September 17, 1954. [CMR 40] In view of his conscientious objections the appeal board sent the file on to the Department of Justice for inquiry, hearing and recommendation. [CMR 40]

The Department of Justice made its recommendation, following the inquiry and hearing before a Hearing Officer. [CMR 58-61] The recommendation and attachments corroborated statements made by Carnes in his answers in the special form for conscientious objector. [CMR 58-61] The recommendation states that his "principal objection appears to be that it is his ministerial status that relieves him from military service." [CMR 59] It quotes from a statement accompanying the special form for conscientious

objector about the nature of his beliefs. [CMR 60] The recommendation did not refer to all the accompanying statements that showed his objections were based upon his neutrality as a conscientious objector. [CMR 47-52]

The recommendation stated that the hearing officer "was not particularly impressed with the sincerity of registrant" and that he appeared to answer "questions which he thought would be more beneficial to his claim." [CMR 60] The Department recommended that the claim be not sustained, primarily because of Carnes' desire to be exempt so that he could preach as a minister of the gospel. [CMR 60]

Accompanying the recommendation were affidavits from three persons who were members of the congregation of Jehovah's Witnesses, supporting the conscientious objector claim. [CMR 64-68]

A copy of the recommendation and résumé was sent to Carnes by the appeal board on May 2, 1955. [CMR 68-69] He answered it and reviewed in detail the history of his case, showing that on January 27, 1953, when he filed the conscientious objector form, he was merely studying with Jehovah's Witnesses and "had not enrolled into the Ministry School." [CMR 69-70] This clarified and answered fully the statement in the recommendation that he did not enroll until September, 1953. [CMR 59] He answered the statement in the recommendation about his willingness to kill in self-defense. [CMR 59, 70] He stated that the hearing officer did not permit him to use any Scriptural proof that he could kill. [CMR 70] He answered the statement about his basing his claim on preaching activity and said: "As I quoted from 2 Corinthians 5:20, 'That we are ambassadors of Christ,' and therefore I am neutral." [CMR 71] He said that Hearing Officer Anderson "was not truthful" and asked "questions in a way wherein I would only give yes for an answer," which could not be so answered without explanation. [CMR 71] He said the hearing officer "tried to put words in my mouth" and that the

hearing officer was a military man and thought only that way. [CMR 71]

Carnes demanded that he be supplied with the full FBI report. [CMR 71] He later requested both the FBI report and the recommendation of the hearing officer before whom his hearing was conducted. [CMR 73] The local board took this matter up with the State Director, who informed the local board that Carnes was not entitled to the FBI report, but it was sufficient to supply him with a copy of the recommendation of the Department of Justice. [CMR 74, 75-76] The local board so informed Carnes. [CMR 77]

The appeal board classified Carnes in I-A on July 11, 1955. [CMR 72] The file was returned to the local board on July 18, 1955. [CMR 40] Notice of classification was mailed to him on July 19, 1955. [CMR 40] He was thereafter given an armed forces physical examination and found fully acceptable, being so informed on September 19, 1955. [CMR 40]

He was ordered to report for induction on November 20, 1956. [CMR 40, 77-78] He reported for, but refused to submit to, induction. [CMR 40, 78-79] It was stipulated that he refused to submit to induction. [CMR 20-21]

Facts—*McFarland*

McFarland was born August 14, 1932. [CMR 79] He registered on August 17, 1950. [CMR 79]. Classification questionnaire was mailed to him on August 14, 1951, and he returned it on August 24, 1951. [CMR 79-80] In the questionnaire he showed that he was a minister of religion associated with the Watchtower Bible and Tract Society since 1941. [CMR 81] He was employed by the Wrenn Paper Company in Middletown, Ohio. [CMR 81-82] He completed elementary school, two years of junior high school and one year high school, but was not graduated. [CMR 82] He attended Theocratic Ministry School of

Jehovah's Witnesses. [CMR 82] He stated he was conscientiously opposed to participation in war in any form and requested exemption as a minister and conscientious objector. [CMR 83]

He accompanied the questionnaire with an affidavit showing he was conscientiously opposed to both combatant and noncombatant military service, regularly served as a minister, attended the Theocratic Ministry School and Bible studies, and requested to be classified in IV-D. [CMR 86] He explained his stand of neutrality, citing scriptures. [CMR 88-91]

On August 24, 1951, he filed special form for conscientious objector. [CMR 91-97] He certified that he was opposed, by reason of his religious training and belief, to participation in war in any form. [CMR 91-92] He showed that he believed in a Supreme Being. [CMR 92] He stated the nature of his belief that involved duties to God superior to any human relation. [CMR 92] He said his belief was based upon the Bible command, "Thou shalt not kill" (Exodus 20:13); that he relied upon the Bible for religious guidance; that he believed in the use of force "when Jehovah, the Supreme Being authorizes the use of force." [CMR 92] He stated he had been raised in a family of Jehovah's Witnesses. [CMR 92-93] He began preaching house to house in 1938 with his father and in the spring of 1941 he dedicated his life "to the service of Jehovah." [CMR 93]

He provided information concerning his general background, such as schooling, jobs, residences and the names of his parents. He showed he had attended ministry school of Jehovah's Witnesses since 1943. His parents are Jehovah's Witnesses. [CMR 93-95]

He indicated in the special form for conscientious objector that he was a member of Jehovah's Witnesses, the governing body of which is the Watchtower Bible and Tract Society, of Brooklyn, New York; that he became a member in the spring of 1941, by studying the Bible with the litera-

ture of the Society. [CMR 95] He stated that the religious organization had no creed, but that each one must individually for himself determine what course to take. [CMR 96]

On November 13, 1951, the local board placed him in Class I-A. [CMR 84] He requested a personal appearance. [CMR 84, 98-99] Following an armed forces physical examination and a declaration of acceptability, on February 13, 1952, he was notified to appear before the local board for a personal appearance on March 10, 1952. [CMR 84, 99] On February 13, 1952, he was also sent a revised special form for conscientious objector that contained objectionable wording in Series I (B). [CMR 99, 100-101] He returned the form on February 20, 1952, without signing either (A) or (B) of Series I. [CMR 100-101] On February 29, 1952, the local board returned the form to him stating that it was necessary that he sign one of the claims. [CMR 108] McFarland again filed the form on March 6, 1952, and explained at great length his reasons for not being able to sign either (A) or (B) of Series I. He stated that by doing so he would be obligated to perform either military or civilian work in violation of his covenant obligations with Almighty God, Jehovah. [CMR 101, 109-113]

He answered the various questions in the revised form. He gave the names of Jehovah God and Christ Jesus as the teachers upon whom he relied most for religious guidance. [CMR 101] He stated that he believed in the use of force in defending "Jehovah's kingdom, property, preaching, meetings, brothers and sisters" and cited scriptures in support of his answer. [CMR 101-102] He filed an affidavit in support of his position. [CMR 106-108]

On March 10, 1952, he appeared before the local board. [CMR 84, 112-113] Thereafter the local board continued the I-A classification. [CMR 84] He timely appealed such classification. [CMR 84, 113-115] The appeal board determined that he should not be classified in I-A-O or

I-O and referred the file to the Department of Justice for inquiry, hearing and recommendation. [CMR 84] The Department conducted the inquiry, arranged for a hearing before a hearing officer and made its recommendation to the appeal board. It recommended that the conscientious objector claim be denied. [CMR 115-117] The appeal board thereupon classified him in I-A on October 13, 1952. [CMR 118] He was informed of such classification on October 29, 1952. [CMR 84] Thereafter, on October 31, 1952, he was ordered to report for induction on December 11, 1952. [CMR 84, 118] He reported for, but refused to submit to, induction. [CMR 85, 119] He thereupon was treated as a delinquent. [CMR 85]

McFarland was prosecuted, but his case was dismissed on April 14, 1955. [CMR 120-121]

The local board reopened his classification and again placed him in Class I-A on May 3, 1955. [CMR 85] He requested a personal appearance and was informed that he could appear on June 7, 1955. [CMR 85, 121-122] He appeared at the scheduled time, when he filed with the local board a memorandum of what he proposed to show. This document covered in detail his training for the ministry, ordination, and ministerial activity, as well as his position of neutrality with respect to wars between nations of this world. [CMR 122-124] The local board made a record of what transpired at the personal appearance. [CMR 125-126] Thereafter, on July 5, 1955, the local board again classified him in I-A. He appealed from such classification and requested classification as a minister. [CMR 85, 126-127] He also requested to be supplied with a copy of the FBI report. [CMR 127-128] On August 1, 1955, the file having been forwarded to the appeal board, the case was again referred to the Department of Justice for advisory recommendation. [CMR 85, 139]

After another investigation [CMR 132-136] and hearing, the Department of Justice made its recommendation to the appeal board, reviewing the facts. [CMR 128-129]

It referred to the earlier hearing and adverse recommendation. [CMR 129] The second hearing was reported in detail, emphasizing McFarland's belief in self-defense. [CMR 129] It mentioned that the hearing officer recommended adversely because of "the foregoing." [CMR 130] The Department then advised the appeal board not to consider the beliefs of McFarland on self-defense, but stated that the "registrant is presently very active in the Jehovah's Witnesses sect, acting as Book Study Conductor in the unit to which he belongs and devoting approximately nine and one-half hours per month to ministerial duties. . . . We are, therefore, of the opinion that registrant's consistent activity in the Jehovah's Witnesses sect bears favorably upon the good faith of his claim." [CMR 130] However, the Department recommended against the complete conscientious objector claim because McFarland said, among other things, that he was a minister and that if he did any kind of work for the government, he would be violating his "covenant with the Almighty God." [CMR 130, 131, 114] The Department then referred to the case of *Tomlinson* v. *United States*, 216 F. 2d 12 (9th Cir. 1954) for reasons why McFarland would not be entitled to the complete conscientious objector classification because he refused to do anything under the law in behalf of the war effort. [CMR 131] The Department then recommended that McFarland be classified in I-A-O as a noncombatant soldier. [CMR 131]

The résumé of the FBI inquiry accompanied the recommendation. [CMR 132-136] Also the affidavit submitted to the hearing officer in behalf of McFarland's claim as a minister accompanied the recommendation. [CMR 136-137]

The appeal board sent to McFarland a copy of the recommendation for his information and reply. He replied stating that he did not believe the finding of the Department of Justice was correct nor did he agree with the reasoning in support of it. [CMR 137-138] McFarland was there-

upon classified in I-A-O by the unanimous vote of the appeal board. [CMR 139] On July 23, 1956, he was notified of such classification. [CMR 85]

On September 24, 1956, he sent an order to report for induction on October 17, 1956. [CMR 85, 140] He reported for but refused to submit to induction. [CMR 85, 140-141] The Director of Selective Service authorized prosecution. [CMR 142] It was stipulated that he refused to submit to induction. [CMR 20-21]

REASONS FOR GRANTING THE WRIT

I.

The documentary evidence submitted by petitioners establishes that each had sincere and deep-seated conscientious objections against his participation in combatant and noncombatant military service that were based on his "relation to a Supreme Being involving duties superior to those arising from any human relation." This material also showed that each petitioner's belief was not based on "political, sociological, or philosophical views or a merely personal code," but that it was based upon his religious training and belief as one of Jehovah's Witnesses, being deep-seated enough to drive him to enter into a covenant with Jehovah and dedicate his life to the ministry.

The decisions of the court below are in direct conflict with the holdings in other cases decided by other Courts of Appeals. In those cases the appellants, like petitioners here, were Jehovah's Witnesses. They showed the same religious belief, the same objection to service and the same religious training. While different speculations were relied upon by the Government which were discussed and rejected by the courts in those cases, the courts were also called upon to say, on facts identical to the facts in these cases, whether there was basis in fact. See *Jewell* v. *United States*, 208 F. 2d 770 (6th Cir. 1953), where the court below, on facts similar to the facts in these cases, found that there

was no basis in fact for the denial of the conscientious objector claim.

The holdings of the Courts of Appeals with which the holdings of the court below in these cases (that there was basis in fact in each case for the denial of the classification) directly conflicts are: *Pine* v. *United States*, 212 F. 2d 93 (4th Cir. 1954); *Annett* v. *United States*, 205 F. 2d 689 (10th Cir. 1953); *United States* v. *Pekarski*, 207 F. 2d 930 (2d Cir. 1953); *Taffs* v. *United States*, 208 F. 2d 329 (8th Cir. 1953); *United States* v. *Hartman*, 209 F. 2d 366 (2d Cir. 1954); *Weaver* v. *United States*, 210 F. 2d 815 (8th Cir. 1954); *Jessen* v. *United States*, 212 F. 2d 897 (10th Cir. 1954); *United States* v. *Close*, 215 F. 2d 439 (7th Cir. 1954); *United States* v. *Wilson*, 215 F. 2d 443 (7th Cir. 1954).

In the event that this Court does not find a conflict between the decisions of the court below in these cases and the above-cited decisions by other Courts of Appeals, then it is submitted that whether each petitioner was denied the full conscientious objector status without basis in fact by the appeal board is an important question of wide public and national importance in the administration of the draft law sufficient to warrant the granting of the writ of certiorari in this case. The identical question was stated in the petition as grounds to warrant the granting of the writ in *Witmer* v. *United States*, 348 U. S. 375 (1955). This Court found it important enough to grant the writ in that case. The importance of the same question raised in that case was basis for granting the writ there. By force of the same reason it should be held again to be sufficient reason to grant the writ here.

II.

The holdings of the court below in these cases, that the recommendation of the Department of Justice in each case to the appeal board that the conscientious objector status could be denied to the petitioners because of the

statement by each that one of the reasons why he desired to be exempted was that he could do his ministerial work, constitutes an important question of law that has not been decided but ought to be decided by this Court. The same question was presented to this Court by the petition for writ of certiorari in *Tomlinson* v. *United States*, No. 391, October Term, 1954; 216 F. 2d 12 (9th Cir. 1954); certiorari denied 348 U. S. 970 (1955). Since the denial of certiorari in that case several hundred cases involving Jehovah's Witnesses have been decided by various district draft appeal boards based upon recommendations of the Department of Justice that where one of Jehovah's Witnesses, although otherwise showing that he was entitled to the conscientious objector classification, stated that his primary desire was to be free to preach, he was to be denied his claim for classification as a conscientious objector. The fact that several hundred of Jehovah's Witnesses have been denied their rights as conscientious objectors solely because of this stated desire shows the importance of these cases. This Court is requested to take jurisdiction because if this erroneous misinterpretation of the Act and Regulations is not stopped ultimately all of Jehovah's Witnesses will be denied right to classification as conscientious objectors under the Act solely because of this religious belief, which in no way disqualifies Jehovah's Witnesses for the conscientious objector classification.

The Act bottoms the right to classification as a conscientious objector upon "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code." (50 U. S. C. App. § 456 (j)) The undisputed evidence and record in all three of these cases show that each of the petitioners is conscientiously opposed to both combatant and noncombatant military service and participation in war in any form. The files of each also show that this religious objection

is based exclusively upon his belief as one of Jehovah's Witnesses in "relation to a Supreme Being [Jehovah God] involving duties superior to those arising from any human relation." The files show that these religious beliefs are not "essentially political, sociological, or philosophical views or a merely personal moral code." Each petitioner was illegally misrepresented to the appeal board by the Department of Justice as being disqualified for the full conscientious objector classification because he stated his "belief in a relation to a Supreme Being," that his highest obligation was to preach and that he wanted to be classified as not liable for military service because he desired to be free to preach. This misrepresentation of a bona fide, deep-seated religious belief, because it did not conform to the orthodox views of the Department of Justice, was a denial of procedural due process. The recommendation in each case, being erroneous as a matter of law, destroys the classification and requires the reversal of the judgments of the court below for the same reason that a reversal was required in *Sicurella* v. *United States,* 348 U. S. 385 (1955); *Taffs* v. *United States,* 208 F. 2d 329 (8th Cir. 1953); *Annett* v. *United States,* 205 F. 2d 689 (10th Cir. 1953); and *Shepherd* v. *United States,* 217 F. 2d 942 (9th Cir. 1954), rehearing denied, 220 F. 2d 855.

It is submitted that the decision of the court below in each of these cases conflicts in principle with the above decisions. However, if this Court should conclude that there is no such conflict, then it is respectfully submitted that this is an important question of wide national interest that commands that the petition for writ of certiorari be granted.

The instruction of the Department of Justice to the appeal board in the cases of Leifer and McFarland that the opinion in *Tomlinson* v. *United States,* 216 F. 2d 12 (9th Cir. 1954), applied, was illegal. [LR 37-38, CMR 131] The facts in these cases are entirely different from those in the *Tomlinson* case. The decision in *Tomlinson* v. *United*

States, 216 F. 2d 12 (1954), is based upon "attitudes" and "demeanors" shown by the registrants upon personal appearance before the local board. There is no showing of a bad attitude or demeanor before either the local board or the hearing officer in these cases. The record of hearings made by both fails to show any such bad conduct.

In the event that the Department of Justice recommendation is taken as true by this Court then it means that none of Jehovah's Witnesses is entitled to the conscientious objector classification. All of Jehovah's Witnesses take the position that, while the Bible commands strict neutrality to all worldly wars as a basis for their conscientious objection, they make the claim so they can be free to preach the gospel of God's kingdom. See *Sicurella* v. *United States*, 348 U. S. 385 (1955). Surely this Court does not intend to permit the Department of Justice to hold that the law of the land is that all of Jehovah's Witnesses are not entitled to claim classification as conscientious objectors. The motive for making the conscientious objection claim is stated to be freedom of the registrant to preach. But the legal basis of the objection under the Act is their religious training and belief in strict Bible neutrality from worldly affairs and the supreme relationship to Jehovah God over any human relationship. This belief is what brings them under the statute. The motive of making the claim so as to be free to preach the gospel does not affect this legal basis of neutrality for the claim. —*Sicurella* v. *United States*, 348 U. S. 385 (1955).

It is submitted that *Tomlinson* v. *United States*, 216 F. 2d 12 (9th Cir. 1954), is distinguishable. If it cannot be found to be distinguished from the facts in these cases then the Court is requested to overrule the decision in *Tomlinson* v. *United States*, 216 F. 2d 12 (9th Cir. 1954), because it is erroneous. It is stated in *Tomlinson* v. *United States*, 216 F. 2d 12, 17 (9th Cir. 1954), that "attitudes and demeanors which develop at the time of such a person's personal appearance may well be controlling factors."

there was no development in the record of disbelief or that Tomlinson was lying. There was no pointing to anything that contradicted what Tomlinson said. The court relied upon the report of the hearing officer as basis in fact for the denial of the conscientious objector claim. Yet all the hearing officer did was to find that Tomlinson and his witness established orally at the hearing exactly what was shown in the written papers. The court proves that he merely repeated what was in his papers by stating that the summary of the hearing made by the hearing officer "reflects the registrant's general attitude as expressed in his letters."

In the face of the record that there was nothing contradictory in the papers or that impeached what Tomlinson said, the court wove a web of basis in fact around the case by saying that there was a hearing and that since the hearing officer could observe the attitude of Tomlinson toward war and other service his recommendation against Tomlinson was final and unreviewable. The holding of the court, which speculates and presumes against Tomlinson without a written record, is in conflict with *United States* ex rel. *Kulick* v. *Kennedy*, 157 F. 2d 811 (2d Cir. 1946), where it was held that if a draft official at a hearing disbelieved a registrant it is necessary to make a memorandum of such disbelief. The court was not authorized to speculate that the hearing officer judged Tomlinson adversely because of demeanor. The process of reaching basis in fact by speculation employed by the court in *Tomlinson* v. *United States*, 216 F. 2d 12 (9th Cir. 1954), is so great a departure from federal administrative law that it is of the greatest importance that the court's decision be not followed by this Court.

The religious objections of each petitioner to the performance of any military service under the Act, going beyond objections to military service but including opposition to such service, do not constitute a basis for a denial of the conscientious objector status. The Government argues that because each petitioner objected to doing anything as one of the military forces and wanted to have no part of the

war effort of the nation, and because he did not limit his objections to military service, he was not a conscientious objector.

The recommendations of the Department of Justice here that each petitioner should not be classed as a conscientious objector because of his desire to be free to do his ministry constituted an unduly restrictive interpretation of Section 6(j) of the Act. There is nothing in the Act or the legislative history of it that indicates Congress intended to limit the religious beliefs of conscientious objectors or prescribe what is orthodox for conscientious objectors. The Department of Justice read into the Act an illegal importation that conflicts with the intent of Congress. This construction of the law emasculates the conscientious objector provisions to such an extent that it is imperative that the judgment ought to be reversed in this case to correct the holding of the Department of Justice.

The Act and the Regulations do not permit the Department of Justice to recommend, or the appeal board to accept the recommendation, that is illegal.

Section 6 (j) provides for the recommendation of the Department of Justice. This is implemented by Section 1626.25 of the Regulations. These make the recommendation a vital link in the chain of administrative proceedings. It is necessary that the Department of Justice proceedings be in accordance with law; otherwise the draft board proceedings are void.

The refusal by the Department of Justice to follow the definition of a conscientious objector fixed by Congress in the Act was equivalent to a complete denial of any hearing at all. A "hearing proceeding upon an erroneous theory . . . is no better than no hearing at all."—*Shepherd* v. *United States*, 217 F. 2d 942, 946 (9th Cir. 1954); see also *Sicurella* v. *United States*, 348 U. S. 385 (1955).

A chain is no stronger than its weakest link. The recommendation of the Department of Justice and its acceptance by the appeal board becomes a link in the chain. Since

it is one of the links of the chain its strength must be tested. (*United States* v. *Romano*, 103 F. Supp. 597 (S. D. N. Y. 1952)) The illegal recommendation that a registrant is not a conscientious objector produces a break in the link and makes the entire Selective Service chain useless, void and of no force and effect. (*Sicurella* v. *United States*, 348 U. S. 385 (1955)) It was held in *Kessler* v. *Strecker*, 307 U. S. 22, 34, that if one of the elements is lacking the "proceeding is void and must be set aside." The acceptance of the recommendation of the Department of Justice makes the proceedings illegal, notwithstanding the fact that the recommendation is only advisory. The embracing of the recommendation by the appeal board jaundiced and killed the validity of the proceedings in each of these cases.

This view of the reliance upon the recommendation of the Department of Justice making the report of the hearing officer and the recommendation a vital link in the administrative chain is supported by *United States* v. *Everngam*, 102 F. Supp. 128, 130-131 (S.D. W.Va. 1951). See also *United States* v. *Bouziden*, 108 F. Supp. 395 (W.D. Okla. 1952); compare *Taffs* v. *United States*, 208 F. 2d 329 (8th Cir. 1953); *Hinkle* v. *United States*, 216 F. 2d 8 (9th Cir. 1954).

The construction that has been placed upon the Act by the Department of Justice in these cases and by the court below is unreasonable. It works a forfeiture against a large segment of religion in the United States. The interpretation of the Act would deny to 200,000 of Jehovah's Witnesses entirely the protection of the law. This would be notorious discrimination of the worst sort.

The interpretation of the Department of Justice is narrow, unreasonable and discriminatory. It undermines the intent of Congress. It flouts the history of fair treatment of conscientious objectors. It twists the words of the law for the purpose of illegally pulling an unpopular religion outside the protection of the law. Congress did not intend any such un-American and unscriptural discrimination. It frames mischief by unequal protection of law, condemned

by the law of God and of man.—Psalm 94:20; *Taffs* v. *United States*, 208 F. 329 (8th Cir. 1953).

In the event that the Court does not find that the holdings of the court below are out of harmony with *Sicurella* v. *United States*, 348 U. S. 385 (1955), then it is submitted, this is an important question of wide public and national importance in the administration of the draft law sufficient to warrant the granting of the writ in these cases.

III.

An important question in the administration of the draft law is here presented to this Court for determination which has not been decided by this Court but which should be determined by it. It is whether the Department of Justice was required to supply each petitioner with the full FBI report so that he could make use of all of the favorable evidence in said report supporting his claim for classification as a conscientious objector.

The Department of Justice denied the petitioners procedural due process of law by failing in each case to send to the appeal board the full FBI report so each petitioner could make use of all the favorable evidence given by informants and other persons interviewed by the FBI in the course of the investigation of the conscientious objector claim of each petitioner, as requested by each petitioner. This constituted a denial of a full and fair hearing before the appeal board in each case contrary to Section 6 (j) of the Act, the Regulations and the Constitution of the United States.

The holdings of the court below that *United States* v. *Nugent*, 346 U. S. 1 (1953), was not overruled or modified by *Jencks* v. *United States*, 353 U. S. 657 (1957), are explained in the judgments of the Court of Appeals at pages 37-40, *infra*, Appendices A, B and C.

It is true that in each case in the final recommendation of the Department of Justice to the appeal board it is implied that the evidence gathered by the FBI report appears in the résumé. But nowhere in the résumé or the

recommendation in each case does it appear that the résumé contains a summary of all the favorable evidence turned up by the FBI investigation. The Court must speculate to say that the résumé does contain all of the favorable evidence. This Court has prohibited any speculation in determining whether the draft boards and the Department of Justice have complied with the procedural due process requirements. —*Simmons* v. *United States*, 348 U. S. 397, 404-406 (1955); *Gonzales* v. *United States*, 348 U. S. 407, 414-417 (1955); compare *Steele* v. *United States*, 240 F. 2d 142 (1st Cir. 1956).

It is submitted therefore that the holdings of the court below are erroneous. The exclusion of the documentary evidence from the record by the Department of Justice, and the Department's withholding it from the appeal board, in each case constituted a deprivation of procedural due process of law. It was for the appeal board, not the Department of Justice, to say whether or not the evidence was relevant or material.—*White* v. *United States*, 215 F. 2d 782, 789-790 (9th Cir. 1954); cert. denied 348 U. S. 970 (1955). The Department of Justice performed only an advisory function.—Compare *United States* v. *Nugent*, 346 U. S. 1 (1953); *Imboden* v. *United States*, 194 F. 2d 508 (6th Cir. 1952).

In *United States* v. *Nugent*, 346 U. S. 1 (1953), it was held that providing a summary of the *unfavorable* evidence to the registrant was enough. But the Court in that case did not rule upon the question of whether or not all the *favorable* evidence appearing in the FBI report should be submitted to the appeal board. The reason why the favorable evidence should be considered by the appeal board is that the Department of Justice made an adverse recommendation to it. In each case it was the responsibility of the appeal board to consider all the favorable evidence turned up by the FBI in its inquiry because such favorable evidence may have exculpated each petitioner from the adverse recommendation to the appeal board.—*White* v. *United States*, 215 F. 2d 782, 789-790 (9th Cir. 1954); cert. denied 348 U. S. 970 (1955).

It is respectfully submitted that this is an important question of law that has not been determined but which should be decided by this Court.

IV.

The holdings of the court below in these cases are out of harmony with the principle of *Jencks* v. *United States*, 353 U. S. 657 (1957), when it approved the ruling of each trial court quashing the subpoena *duces tecum* for the FBI report in each case, which was needed for the purpose of determining whether or not the Department of Justice denied each petitioner a full and fair hearing by withholding favorable evidence from the appeal board.

The holding of the Court of Appeals that *United States* v. *Nugent*, 346 U. S. 1 (1953), precludes the compulsory production of the FBI report at the trial even when it is sought to establish a denial of procedural due process in each case before the appeal board by the Department of Justice in withholding from the appeal board favorable evidence developed by the FBI inquiry appears at pages 37-40, *infra*. Appendices A, B and C.

At the trial each petitioner contended that the Department of Justice had not forwarded to the appeal board in the résumé all the favorable evidence that had been turned up by the FBI inquiry. Compare the résumé with the contention that it was inadequate.

At each trial when the FBI report was subpoenaed and upon the appeal each petitioner contended that the FBI report was relevant to show that he had been denied procedural due process of law before the appeal board because the Department of Justice did not provide the petitioner and the appeal board with summaries of all the favorable evidence appearing in the FBI report so as to overcome the adverse recommendation made to the appeal board and also to show that there was no basis in fact for denying the full conscientious objector claim. This was a fact issue in the district court in each case. The question was whether each

petitioner was wrongly denied the right to make proof when the ruling was made refusing to compel the production of the FBI report for the purpose of comparison of it with the summaries provided by the Department of Justice to each petitioner and to the appeal board in each case.

The court below approved the ruling of the trial court in each case excluding the FBI report, and held that each petitioner was not entitled to prove that he was denied procedural due process of law through the failure of the Department of Justice to make a full and fair summary of the favorable evidence in each case. This ruling of the court below is in conflict with *United States* v. *Andolschek*, 142 F. 2d 503, 506 (2d Cir. 1944); *United States* v. *Krulewitch*, 145 F. 2d 76 (2d Cir. 1944); and *United States* v. *Beekman*, 155 F. 2d 580 (2d Cir. 1946).

It must be conceded that, in the trial of all conscientious objector cases under the Act, there is an issue of procedural due process in Department of Justice proceedings. It is to determine whether the Department of Justice has broken the link in the procedural chain by denying procedural due process of law. This was so held in *Gonzales* v. *United States*, 348 U. S. 407 (1955); *Simmons* v. *United States*, 348 U. S. 397 (1955); and *Sicurella* v. *United States*, 348 U. S. 385, (1955). There is still another way by which the Department may deny procedural due process of law. It is by concealing or holding back from the consideration of the appeal board favorable evidence supporting petitioner's conscientious objector claim. This is through making an incomplete or inaccurate summary of the original FBI reports, suggested in *United States* v. *Nugent*, 346 U. S. 1 (1953).

Since this is an issue for the district court trying the conscientious objector cases to decide, the question inevitably arises: How can the trial court determine whether the Department of Justice withheld evidence by making an incomplete summary? The question answers itself:

By a mere comparison of the documents with the summaries thereof.

Even the court in *Blalock* v. *United States*, 247 F. 2d 615 (4th Cir. 1957), admitted this by a statement made in its opinion. The court said: "Moreover, it is undeniably true that one cannot easily judge the fairness and completeness of a resume without looking at the documents it purports to summarize." See 247 F. 2d at page 620. The issue can be very well likened to that of a trial where a book review is the subject of inquiry. How can the court determine whether the book review is full and fair without reading the book? The judicial function could not be completed unless and until the book was produced. So it is here. The court cannot say whether a fair summary of the favorable evidence was given until the FBI report, which was summarized, is produced for comparison.

A question similar to that presented here was submitted to this Court in *Simmons* v. *United States*, 348 U. S. 397 (1955). Read what this Court said in the last paragraph of that opinion. (348 U. S. at page 406) It was presented to this Court in other cases. See footnote 3 of the opinion in *Blalock* v. *United States*, 247 F. 2d at page 621. The denial of certiorari in those cases is insignificant.—*United States* v. *Carver*, 260 U. S. 482, 490 (1923); compare special concurring opinion of Mr. Justice Frankfurter in *Maryland* v. *Baltimore Radio Show*, 338 U. S. 912 (1950).

In *Simmons* v. *United States*, No. 251, October Term, 1954 at page 17 of the Memorandum of the United States in Opposition, Judge Sobeloff (author of the opinion in *Blalock* v. *United States*, 247 F. 2d 615 (4th Cir. 1957)) (then Solicitor General) told this Court: "However, if the Court does not deem this issue determined by *Nugent*, we would not oppose the grant of certiorari on this point, in view of the series of contrary district court rulings which

the government has been unable to appeal since refusal to disclose has resulted in judgments of acquittal."[2] Since the date of the decision in *Jencks* v. *United States*, 353 U. S. 657 (1957), the United States District Court for the Western District of Washington in *United States* v. *Jacobson*, 154 F. Supp. 103 (W. D. Wash. 1957), decided the identical issue present here in conflict with the decision of the court below. This continuing conflict between the district courts in many parts of the country with the decisions of the courts of appeals is still of sufficient importance to justify the granting of the writ in these cases.

Generally the same cases cited by the court in *Blalock* v. *United States*, 247 F. 2d 615 (4th Cir. 1957), in footnote 3 of the opinion may be distinguished. This is because they involved an attempt to subpoena the FBI report for the purpose of showing that adverse evidence against the registrant was withheld at the hearing in the Department of Justice. The reason they are distinguishable is that here the FBI report is needed to determine whether favorable evidence has been withheld from the appeal board. In the cases referred to involving the withholding of unfavorable evidence at a hearing, it may be said the situation is different from the case here where favorable evidence is held back.[3] It may also be said, but not admitted, that the registrant is not unduly harmed in the administrative proceedings by withholding unfavorable evidence at the Department of Justice hearing. The reason may be that the written summary of the unfavorable evidence is all that reaches the appeal board and the registrant has the right to answer that before the appeal board. (*Gonzales* v. *United States*,

[2] See the district court opinions: *United States* v. *Edmiston*, 118 F. Supp. 238, 240 (D.Neb. 1954); *United States* v. *Evans*, 115 F. Supp. 340, 343 (D. Conn. 1953); *United States* v. *Stull*, No. 5634, Eastern District of Virginia, Richmond Div., Nov. 6, 1953; *United States* v. *Stasevic*, 117 F. Supp. 371 (S. D. N. Y. 1953); *United States* v. *Parker*, No. 3651, District of Montana, Butte Div., Dec. 2, 1953; *United States* v. *Brussell*, No. 3650, District of Montana, Butte Div., Nov. 30, 1953.

[3] Petitioners do not admit that the holdings by the Courts of Appeals cited in footnote 3 of the *Blalock* opinion are correct.

348 U. S. 407 (1955)) He has no way, however, of overcoming the prejudice done by holding back and not making known to him and to the appeal board of the favorable evidence.

Petitioners suggest that it may be that the reason the petition for writ of certiorari was denied in *White* v. *United States*, 348 U. S. 970 (1955), after the statement made in the last paragraph of the opinion in *Simmons* v. *United States*, 348 U. S. 397, 406 (1955), was that the procedure established that day in *Gonzales* v. *United States*, 348 U. S. 407 (1955), would thereafter prevent the question from again arising or would be a sufficient guarantee against the denial of due process in cases involving unfavorable evidence not given to the registrant at the Department of Justice hearing.

The denial of certiorari in *White* v. *United States*, 215 F. 2d 782 (9th Cir. 1954) (cert. denied, 348 U. S. 970 (1955)), may have been based on the proposition that the résumé of the adverse evidence spoke for itself and there was no need to look at the FBI report to determine whether the registrant was harmed because he had the opportunity to answer the only adverse evidence before the Department of Justice that was used before the appeal board. Compare *United States* v. *Nugent*, 346 U. S. 1 (1953), with *Gonzales* v. *United States*, 348 U. S. 407 (1955). The question decided in *White* v. *United States*, 215 F. 2d 782 (9th Cir. 1954), cert. denied 348 U. S. 970 (1955), was presented to this Court but not decided in *Simmons* v. *United States*, 348 U. S. 397, 406 (1955).

An entirely different question arises when, as here, the federal courts are called upon to determine whether all the *favorable* evidence has been presented by the Department of Justice to the registrant and to the appeal board. On such an issue the harm or prejudice done to the registrant by the Department of Justice is not an act of commission that the registrant can answer but is an act of omission that

the registrant has no way of protecting himself against. Where adverse evidence is used in the Department of Justice or before the appeal board, the rights of the registrant may be said to be adequately protected by the right to answer the unfavorable evidence made known to the registrant. Since his right in respect to the adverse evidence is protected by the right to reply to it before the appeal board, there is no need to subpoena the FBI report to determine if all the unfavorable evidence has been divulged, although petitioner does not concede this since the question is still open in this Court. See *Simmons* v. *United States*, 348 U. S. 397 (1955), and *Gonzales* v. *United States*, 348 U. S. 407 (1955). But in the case of withholding favorable evidence the situation is just the reverse of that involving adverse evidence used before the appeal board. This vast difference makes entirely inapplicable the arguments and reasons relied upon by the Government and by the Courts of Appeals for not producing the FBI report of the trials where the only question involved is the use of unfavorable evidence. (*Campbell* v. *United States*, 221 F. 2d 454 (4th Cir. 1955); *Simmons* v. *United States*, 213 F. 2d 901 (7th Cir. 1954) (reversed on other grounds, 348 U. S. 397 (1955)).

The court below grounded its decision in these cases upon *United States* v. *Nugent*, 346 U. S. 1 (1953). That decision gives no support for the holding in these cases. Nugent involved only the question of whether all the adverse evidence in the FBI report should be given to the registrant during the administrative proceedings by submitting the original report to him. The Court held that giving a summary of the adverse evidence was sufficient. The question of whether the defendants in that case had the right to subpoena the FBI report at the trial was not determined, although it was raised in the brief filed in this Court.

Since the question was not decided by this Court in *Nugent* (346 U. S. 1 (1953)), then how can the Court of Appeals amend the decision of this Court in *Nugent* (346 U. S. 1 (1953)) by saying that it was decided? The very fact

that the decision of the court below is based upon a non-existent holding by this Court in *United States* v. *Nugent*, 346 U. S. 1 (1953), is itself a sufficient reason for granting the writ of certiorari in these cases. Consider also the last two paragraphs of the opinion of the court in the *Blolock* case (247 F. 2d 615, 621), where the court indicates its extreme uncertainty about its holding.

It is submitted that the writ should be granted because (1) the decision of the court below is in direct conflict with *United States* v. *Beekman*, 155 F. 2d 580 (2d Cir. 1946); *United States* v. *Krulewitch*, 145 F. 2d 76 (2d Cir. 1944); and *United States* v. *Andolschek*, 142 F. 2d 503, 506 (2d Cir. 1944), and (2) the decision below also is out of accord with *Jencks* v. *United States*, 353 U. S. 657 (1957). See also the Act of Congress printed as Appendix E at pages 44-46, *infra*. In the event that this Court does not so find, then it is submitted that, for the reasons above stated, the question is of such wide public and general national importance in the administration of the criminal sanctions clause of the federal draft law as to warrant a granting of the writ.

CONCLUSION

WHEREFORE, for the reasons above stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

HAYDEN C. COVINGTON
124 Columbia Heights
Brooklyn 1, New York

Counsel for Petitioner

November, 1958.

APPENDIX A

Judgment of the Court of Appeals

(Filed October 22, 1958)

No. 13,464

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

ARNOLD WILLIAM LEIFER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Before SIMONS and MARTIN, Circuit Judges; THORNTON, District Judge.

The appellant, having waived trial by jury, was convicted for refusing to submit to induction into the armed forces of the United States, after being ordered so to do by his local Board, and was sentenced to two years' imprisonment.

Appellant contends that the denial of his classification as a full conscientious objector, obliging him to do non-combatant military service, was arbitrary, capricious and that he was illegally denied the use of the Federal Bureau of Investigation reports in furtherance of his contention that he had been denied procedural due process of law.

The record reveals substantial evidence that appellant objected to non-combatant military service for the sole reason that it would interfere with his missionary activities. This, in our judgment, is not sufficient grounds for the allowance of a claim to conscientious objection to non-combatant military service. We are in accord with the opinion of the Court of Appeals for the Ninth Circuit in

Tomlinson v. *United States*, 216 F. (2d) 12. In a prosecution for refusing to submit to induction, the defendant is not entitled to the full report made by the Federal Bureau of Investigation, but only to a fair resume thereof. *Blalock* v. *United States*, 247 F. (2d) 615 (C. A. 4); *United States* v. *Nugent*, 346 U. S. 1.

The judgment of the district court is affirmed.

APPENDIX B

Judgment of the Court of Appeals

(Filed October 22, 1958)

No. 13,560

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

GEORGE FREDERICK CARNES,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Before SIMONS and MARTIN, Circuit Judges; THORNTON, District Judge.

This appellant, having waived trial by jury, was convicted by the district court for violation of Title 50, App., section 462, United States Code, in refusing to be inducted for service in the armed forces of the United States, and was sentenced to two years' imprisonment.

For the reasons stated in the oral opinion of District Judge Swinford, we think the judgment of conviction and sentence should be upheld. The facts of the case bring it within the principle of *United States* v. *Nugent*, 346 U. S. 1.

In the instant case, the defendant-appellant, in compliance with the doctrine of the *Nugent* case, was furnished a fair resume of any adverse evidence in the report of the investigator. He was not entitled to the production of all the investigative records of the Federal Bureau of Investigation.

Accordingly, the judgment of the United States District Court is affirmed.

APPENDIX C

Judgment of the Court of Appeals

(Filed October 22, 1958)

No. 13,561

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

JOHN HENRY MCFARLAND

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Before SIMONS and MARTIN, Circuit Judges; THORNTON, District Judge.

This appellant, having waived trial by jury, was convicted by the district court for violation of Title 50, App. section 462, United States Code, in refusing to be inducted for service in the armed forces of the United States, and was sentenced to two years' imprisonment.

For the reasons stated in the oral opinion of District Judge Swinford, we think the judgment of conviction and sentence should be upheld. The facts of the case bring it within the principal of *United States* v. *Nugent*, 346 U. S. 1.

In the instant case, the defendant-appellant, in compliance with the doctrine of the *Nugent* case, was furnished a fair resume of any adverse evidence in the report of the investigator. He was not entitled to the production of all the investigative records of the Federal Bureau of Investigation.

Accordingly, the judgment of the United States District Court is affirmed.

APPENDIX D

Section 1622.11 of the Regulations (32 C. F. R. § 1622.11; E.O. 10292, 16 F. R. 9862, Sept. 28, 1951) reads as follows:

§ 1622.11 *Class I-A-O: Conscientious objector available for noncombatant military service only.* (a) In Class I-A-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to combatant training and service in the armed forces.

(b) Section 6 (j) of title I of the Universal Military Training and Service Act, as amended, provides in part as follows:

Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.

Section 1622.14 of the Regulations (32 C. F. R. § 1622.14; E.O. 10420, 17 F. R. 11593, Dec. 19, 1952) reads as follows:

§ 1622.14 *Class I-O: Conscientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest.* (a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces.

(b) Section 6 (j) of title I of the Universal Military Training and Service Act, as amended, provides in part as follows:

Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human

lation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.

(Section 1622.14 (b) contained in E. O. 10292, 16 F. R. 9982, Sept. 28, 1951.)

Sections 1626.25 (a), 1626.25 (b) and 1626.25 (c) of the Regulations (32 C. F. R. §§ 1626.25 (a), 1626.25 (b) and 1626.25 (c); E. O. 10363, 17 F. R. 5456, June 18, 1952) read as follows:

§ 1625.25 *Special provisions when appeal involves claim that registrant is a conscientious objector.* (a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall take the following action:

(1) If the registrant has claimed, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and by virtue thereof to be conscientiously opposed to participation in combatant training and service in the armed forces, but not conscientiously opposed to participation in noncombatant training and service in the armed forces, and the local board has classified the registrant in Class I-A-O, the appeal board shall proceed with the classification of the registrant. If, in such a case, the local board has classified the registrant in any class other than Class I-A-O, the appeal board shall transmit the entire file to the United States Attorney for the Federal judicial district in which the appeal board has jurisdiction for the purpose of securing an advisory recommendation from the Department of Justice.

(2) If the registrant has claimed, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and by virtue thereof to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces, and the local board has classified the registrant in Class I-O, the appeal board shall proceed with the classification of the registrant. If, in such a case, the local board has classified

the registrant in any class other than Class I-O, the appeal board shall transmit the entire file to the United States Attorney for the Federal judicial district in which the appeal board has jurisdiction for the purpose of securing an advisory recommendation from the Department of Justice.

(b) Whenever a registrant's file is forwarded to the United States Attorney in accordance with paragraph (a) of this section, the Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of induction be ordered by his local board to perform for a period of twenty-four consecutive months civilian work contributing to the maintenance of the national health, safety, or interest. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

(c) Upon receipt of the report of the Department of Justice, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendation of the Department of Justice. The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant the letter containing the recommendation of the Department of Justice.

APPENDIX E

CRIMINAL CODE AMENDMENT
Public Law 85-269
85th Congress, S. 2377
September 2, 1957

AN ACT

To amend chapter 223, title 18, United States Code, to provide for the production of statements and reports of witnesses.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 223 of title 18, United States Code, is amended by adding a new section 3500 which shall read as follows:

"3500. Demands for production of statements and reports of witnesses

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

"(b) After a witness called by the United States has testified on direct examination, the Court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

"(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

"(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

"(e) The term 'statement', as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

"(1) a written statement made by said witness and

signed or otherwise adopted or approved by him; or

"(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

The analysis of such chapter is amended by adding at the end thereof the following:

"3500. Demands for production of statements and reports of witnesses."

Approved September 2, 1957 (71 Stat. 595).

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JAMES R. BROWNING, Clerk

No. 525

In the Supreme Court of the United States

OCTOBER TERM, 1958

ARNOLD WILLIAM LEIFER, GEORGE FREDERICK CARNES AND JOHN HENRY MCFARLAND, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM ANDERSON,
Assistant Attorney General,
BEATRICE ROSENBERG,
EUGENE L. GRIMM,
Attorneys,
Department of Justice, Washington 25, D. C.

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In the Supreme Court of the United States

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OPINIONS BELOW

The Court of Appeals did not write opinions in these cases. Its reasons for affirmance were set out in the separate judgments (Pet. 37–40).

JURISDICTION

The judgments of the Court of Appeals as to all three petitioners were entered on October 22, 1958 (LR 12b, CMR 170–172).[1] The petition for a writ of

[1] The record in the *Leifer* case, consisting of the appendices to the briefs filed by the parties in the court below, will be referred to as "LR". The record in the *Carnes* and *McFarland* cases will be referred to as "CMR".

certiorari was filed on November 18, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the classification of petitioners by the Selective Service System as available for noncombatant service (Leifer and McFarland) and as available for unrestricted service (Carnes) had basis in fact.

2. Whether the District Court erred in quashing petitioners' subpoenas *duces tecum* calling for the production of F. B. I. reports.

STATUTE INVOLVED

Universal Military Training and Service Act, 62 Stat. 604, as amended:

> Section 6 (j) [50 U. S. C. App. 456 (j)]:
>
> Nothing contained in this title [sections 451-454 and 455–471 of this Appendix] shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is in-

ducted into the armed forces under this title [said sections], be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) [section 454 (b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title [section 462 of this Appendix], to have knowingly failed or neglected to perform a duty required of him under this title [sections 451–454 and 455–471 of this Appendix]. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such a claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sus-

tained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title [said sections], he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) [section 454 (b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title [section 462 of this Appendix], to have knowingly failed or neglected to perform a duty required of him under this title [sections 451–454 and 455–471 of this Appendix]. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. * * *.

STATEMENT

Petitioner Leifer seeks review of a judgment affirming his conviction in the United States District Court

for the Northern District of Ohio, Eastern Division, for refusal to submit to induction into the armed forces for noncombatant service, in violation of Section 12 (a) of the Selective Service Act, 62 Stat. 604, 50 U. S. C. App. 462 (a) (LR 2a, 10b). He was found guilty by the court without a jury and, on November 1, 1957, was sentenced to two years' imprisonment (LR 45a, 11b).

Petitioners Carnes and McFarland seek review of judgments affirming their convictions in the United States District Court for the Eastern District of Kentucky for refusal to submit to induction into the armed forces,[2] in violation of Section 12 (a) of the Selective Service Act, 62 Stat. 604, 50 U. S. C. App. 462 (a) (CMR 2–3). They were found guilty by the court following trial without a jury and each was sentenced to two years' imprisonment on February 26, 1958 (CMR 153, 161, 163).

The evidence pertaining to each petitioner may be summarized as follows:

1. As to petitioner Leifer

a. On July 30, 1951, petitioner Leifer, who was then 18 years of age, registered under the selective service laws (LR 10a). He filed his questionnaire on December 19, 1951, stating, *inter alia,* that he had been ordained a minister of Jehovah's Witnesses in 1942 (when he was 8 years old) and that he began what he

[2] Carnes was classified for combatant service; McFarland for noncombatant service (CMR 159).

called his full-time ministry on December 1, 1951 (LR 11a). He stated further that he worked about 20 hours per week as a "saw sharpener" sharpening "band and circular saws" and that he was a high school graduate. Petitioner signed the space in which conscientious objectors indicate their desire to be furnished the special form for persons of that persuasion (LR 12a–13a) and indicated that he believed he should be classified 4–D as a minister (LR 14a).

In his special form for conscientious objectors, filed on March 11, 1952, petitioner stated that he was opposed to participation in both combatant and noncombatant service because "one ordained cannot turn aside from his covenant to preach, for any reason: the covenant [which he entered by joining Jehovah's Witnesses] requires faithful preaching, even to the point of death" (LR 19a). He asserted a belief in the use of force under certain circumstances—to protect his family or his ministry, for example (LR 22a). He explained that he was raised as a Jehovah's Witness by his parents (LR 22a), had signified his "desire" to serve the Almighty God Jehovah "by public water immersion" in 1942 (LR 19a), and had attended his local "Theocratic Ministry School" for eight years (LR 19a). Petitioner answered "no" to the question whether he had given public expression to his views regarding conscientious objection (LR 24a). He summed up his views as follows (LR 20a):

> Rendering military service is done unto Caesar and is contrary to God's law which

requires me to take my stand as a minister with conscientious objections, notwithstanding the fact that I am not a pacifist.

On March 25, 1952, petitioner was classified I–A, eligible for induction for combat training, by unanimous vote of his local board (LR 14a). His request for a personal appearance before the local board was granted (LR 14a). Petitioner essentially repeated his answers to the questionnaire on April 23, 1952 during the course of his personal appearance before the board. He again stated that a person who has made a covenant to preach must remain at his preaching in time of war, and that he intended to keep himself apart from conflicts between nations because these wars "are not sanctioned by God" (LR 1b–2b). He said that he spent about 100 hours each month in furthering the work of Jehovah's Witnesses by street preaching, home calls, and distribution of written material (LR 2b–3b), and again asked to be classified "4–D as an ordained minister" (LR 6b). Petitioner expressly stated that he did not want to be classified as eligible for noncombatant training (I–A–O) or as eligible for civilian work contributing to a national interest (I–O). "I cannot turn aside from this covenant to preach for any reason" (LR 6b–7b). On April 29, 1952, the I–A classification was continued and petitioner appealed (LR 15a).

Petitioner appeared before a hearing officer of the Department of Justice on November 10, 1953. At that time petitioner was working about 20 hours each

week as a salesman. The résumé of an investigative report considered at that time noted that petitioner's former teachers, fellow-employees, neighbors and friends believed that petitioner was sincere in his religious beliefs. He was active in the works of the Jehovah Witnesses, at that time devoting approximately 65 hours each month thereto (LR 30a–32a). Petitioner told the hearing officer that he could not work as a minister in a camp or work in a hospital to alleviate suffering because those duties would hinder his ministry or conflict with his ministerial duties (LR 32a). The hearing officer concluded that petitioner was sincere in his beliefs and recommended that his claim be sustained. The Department of Justice overruled this recommendation, however, on the ground that, although petitioner was a sincere Jehovah's Witness, his beliefs did not include non-participation in war in any form, and recommended that petitioner's objections to combatant and noncombatant service be rejected (LR 33a). The appeal board accordingly classified petitioner I–A on December 8, 1953 (LR 34a).

Petitioner's classification was reopened on June 13, 1955, and he was again classified I–A by his local board (LR 15a).[3] Petitioner was given a second

[3] At the time when the Department of Justice first recommended rejection of petitioner's claims it was believed that willingness to participate in theocratic warfare was a sufficient basis to deny a claim of conscientious objection to participation in war in any form. The decision of this Court in *Sicurella* v. *United States*, 348 U. S. 385, necessitated reconsideration of all classifications based on that ground (LR 37a).

personal hearing and the I–A classification was confirmed. Once again he appealed, and the appeal board again referred the file to the Department of Justice for a recommendation (LR 16a).

Petitioner appeared before a hearing officer for the second time on July 26, 1956. The hearing officer found no substantial change in petitioner's earlier beliefs. Petitioner stated, however, that he devoted only about 16 hours per month to religious activities at that time but again sought exemption as a minister. He stated that "if he was found to be a conscientious objector, he would refuse to serve in any civilian capacity, even for the public health, safety or welfare, so long as it was in compliance with an order of the United States Government." The hearing officer again concluded that petitioner was sincere in his beliefs and recommended that he be granted a I–O classification. The Department of Justice recommended that petitioner be classified I–A–O, since his only objection to noncombatant training was that it would interfere with his ministry (LR 35a–37a).

On September 25, 1956, the appeal board classified petitioner as I–A–O. At that time the board had before it the entire file, which included a résumé of two investigative reports. Petitioner had received a copy of this résumé from the hearing officer and had received a copy of the recommendation of the Department of Justice almost two months before the appeal board acted (LR 39a–40a, 8b). The résumé supported the conclusion that petitioner was

a sincere Jehovah's Witness. Although invited to do so, petitioner did not file a reply to the Department of Justice recommendation (LR 17a).

At trial it was stipulated that petitioner was examined and found physically fit for induction, and that he reported as ordered but refused to submit to induction (LR 9b).

b. Prior to trial petitioner Leifer subpoenaed "the complete F. B. I. report that was made when * * * [his] case was before the Department of Justice * * *" (LR 3a). At trial he made a motion for judgment of acquittal alleging, *inter alia,* the same ground (LR 41a). The government's motion to quash the subpoena *duces tecum* was granted and petitioner's motion for acquittal was denied (LR 44a).

In an oral statement delivered at the close of trial, the trial court ruled that there was evidence from which the appeal board could conclude that petitioner was opposed to noncombatant service because it would conflict with his ministerial duties; that there was thus a basis for the board's conclusion that petitioner was not conscientiously opposed to noncombatant service because of religious belief; and that the court therefore had no right to upset the classification made by the appeal board (LR 10b–11b). On appeal, the court below agreed that an objection to noncombatant service on the ground that it would interfere with proselytizing activities is not the type of conscientious objection to noncombatant service to which Section 6 (j) refers (LR 12b).

2. As to petitioner Carnes

a. Petitioner Carnes, then 18 years of age, registered with his local draft board on January 28, 1952, and filed his questionnaire on February 9, 1953 (CMR 35–36). At that time he stated, *inter alia,* that he was a full-time high school student and a part-time janitor at a local Lutheran church (CMR 37–38). He did not sign the space provided for those who wish to indicate conscientious opposition to participation in war in any form by reason of religious training and belief (CMR 39). On March 4, 1953, the local board deferred petitioner as a student until June 1954, his expected date of graduation (CMR 39).

Carnes filed his special form for conscientious objectors on July 19, 1954 (CMR 41). At that time he stated that he was opposed to participation in both combatant and noncombatant service, although not a pacifist, and asked for exemption as either a minister or a conscientious objector. He expressed a belief in the use of force as a means of self defense and to protect his loved ones and home. He said that he began to study the Bible and the literature of the Watchtower Bible and Tract Society in October, 1952, dedicated himself "to the will of Jehovah" in January, 1954, and regarded himself as a "minister" since that time (CMR 42–43, 49). According to petitioner, he devoted about 55 hours per month to his ministerial work of street preaching and pamphlet distribution, was neutral toward the affairs of the world, and was

not willing to perform the "governmental work required of men who are conscientious objectors" since he could not turn aside from his ministerial duties (CMR 48–49). In an affidavit filed to support his claim as a conscientious objector, petitioner further detailed his status. He said he had attended his congregation's Theocratic Ministry School since September, 1953. "I am not a pioneer or full time minister of the Watchtower Society but I am ordained and recognized as a part time or congregational publisher. * * * My preaching activities in which I am engaged in entitle me to exemption from performing military training and service in the Armed Forces of the nation. The exempt status that I have also relieves me from performing governmental work * * * for I am a minister of the gospel * * *" (CMR 51-52). Petitioner appeared in person before the board on September 8, 1954, and substantially repeated the facts set out in his conscientious objector form and written affidavit. It was brought out at that time that petitioner lived with his mother, who was a Baptist, and that he was not authorized by the Jehovah's Witnesses to administer the ordinances of public worship (CMR 52–53). The local board classified petitioner as I–A that same day. He appealed, and the appeal board requested an advisory recommendation from the Department of Justice (CMR 40, 54).

Petitioner was granted a hearing on December 11, 1954 (CMR 59). The hearing officer reported that he was not particularly impressed with petitioner's sin-

cerity in his claim of being a conscientious objector, observing that "the registrant appeared to be intelligent, but his answers to questions put to him indicated that he gave only answers which he thought would be most beneficial to his claim as a conscientious objector, whether or not they were truthful." The hearing officer accordingly recommended that registrant's claim as a conscientious objector opposed to both combatant and noncombatant military service be rejected (CMR 60).

In reaching his recommendation, the hearing officer took into consideration the résumé of an investigative report. The résumé indicated that petitioner was an excellent student in high school, was considered honest, trustworthy, reliable, and likely to be sincere in his religious beliefs by his part-time employer, and was well thought of by his neighbors. In particular, his neighbors regarded him as a very quiet, well-behaved young man who had few friends, attended no social functions, and seemed devoted to the study and teachings of the Jehovah's Witnesses during the past three years. The résumé also mentioned that, according to an official of the Jehovah's Witnesses, each member of the sect reaches his own decision as to military service (CMR 61–63).

In its report to the appeal board, the Department of Justice noted that, although in his special form for conscientious objectors petitioner claimed that he began to study the literature of the Jehovah's Witnesses in October, 1952, his questionnaire, filed in January, 1953, made no mention of the fact, nor did he claim

to be a conscientious objector at that time (CMR 59). It was also observed that petitioner attended Bible School at the Lutheran church where he worked until March 1954 (CMR 58). On this basis, and in view of the hearing officer's personal observations, the Department concurred in the hearing officer's recommendation (CMR 60). Four affidavits, signed by 38 Jehovah's Witnesses attesting to their belief in petitioner's sincerity and to his status as a part-time preacher, were attached to the Department's recommendation and forwarded to the appeal board (CMR 64–68).

In a reply to the recommendation of the Department of Justice, filed May 27, 1955, petitioner attempted to explain the facts stated in the recommendation, disputed the inferences to be drawn therefrom, and questioned the motives and fairness of the hearing officer. He also requested the full F. B. I. report (CMR 69–71).

On July 18, 1955, the appeal board by unanimous vote classified petitioner I–A, making him eligible for unrestricted military duty (CMR 72).

Petitioner then asked his local board to furnish him with a copy of the F. B. I. report and of the recommendation of the hearing officer (CMR 73). On August 15, 1955, the board declined to do so. It pointed out that petitioner had received a copy of the résumé of the F. B. I. report and a copy of the recommendation by the Department of Justice, and thus was in possession of all the information considered by the appeal board (CMR 76–77).

Petitioner Carnes was ordered to report for induction on November 6, 1956. On November 20, 1956, he refused to submit to induction (CMR 77–79).

b. Prior to trial petitioner subpoenaed the complete F. B. I. report in his case but the subpoena was quashed on motion on January 8, 1958 (CMR 3–4, 5). At trial, it was stipulated that the petitioner had refused to be inducted (CMR 31).

3. As to petitioner McFarland

a. Petitioner McFarland became 18 years of age on August 14, 1950, and registered with his local board three days later (CMR 79). About a year thereafter, on August 24, 1951, he filed his questionnaire, claiming that he had been ordained as a minister in 1941, at the age of 8, and requesting that he be classified IV-D as a minister of the Watchtower Bible and Tract Society (CMR 80–81, 86). At that time petitioner was employed by a paper company, working 52 hours each week, and was attending his local Theocratic Ministry School. He requested exemption as a conscientious objector if not as a minister (CMR 81–83). Petitioner amplified his position in an affidavit filed with the questionnaire. As a Jehovah's Witness, he regarded himself as in the world but not of it, and conscientiously objected to "serving in the armies of the evil world of Satan. As soldiers of God they [the Witnesses] cannot engage in the conflicts and warfare that flow from the affairs of this world. They * * * must be at their missionary post of duty" (CMR 90).

Petitioner McFarland also filed a special form for conscientious objectors on August 24, 1951. In that form he asserted an objection to both combatant and noncombatant service, claiming that he believed in using force only when authorized to do so by Jehovah (CMR 81–92). He had been raised as a Jehovah's Witness by his parents and had attended his local ministry school since 1943 (CMR 93–96).

In October 1951, jurisdiction over petitioner was transferred to a different local board (CMR 97), which classified him as I–A on November 13, 1951 (CMR 84). Petitioner protested, asked for a personal interview, and submitted an affidavit and a second special form for conscientious objectors (CMR 98–100) (this being a revised form superseding all others (CMR 101)). Once again he claimed a belief that obedience to Jehovah is superior to any human relation. He explained that he believed in the use of force to defend "Jehovah's kingdom, property, preaching, meetings, brothers and sisters" (CMR 101) and that he preached "the Gospel of the Kingdom from house to house and publicly" (CMR 104). Because of his dedication to Jehovah God, he said, "I am * * * no part of this world which is governed by the political system. * * * I tell officials of the Government that I conscientiously object to serving in any military establishment or any civilian arrangement that substitutes for Military Service" (R. 107). In line with this, petitioner refused to elect to perform either noncombatant military or civilian work contributing to the maintenance of the national health, safety, or in-

terest if exemption as a conscientious objector was granted (CMR 100–101). When the local board directed petitioner to elect one or the other he again refused, saying that to agree to perform any kind of service would violate his covenant with Almighty God and hinder him in carrying out his ministerial duties (R. 108–110). In a personal appearance on March 10, 1952, petitioner stated that he was opposed to contributing to war in any form (R. 112–113). His I-A classification was continued and petitioner appealed (R. 84, 113). The case was referred to the Department of Justice for a recommendation.

The hearing officer found that petitioner's claim as a conscientious objector was not well taken. He considered the résumé of an investigative report which revealed that, although petitioner's employers and fellow employees regarded him as of good character and reputation, he had never voiced his views as a Jehovah's Witness or as a conscientious objector. The résumé mentioned that, according to his assistant company servant, petitioner had not been very active in religious work and was not well enough known by him to be recommended. Moreover, the résumé continued, petitioner's mother had been heard to say that she would use any means to keep petitioner out of the service. Nonetheless, the résumé concluded that all persons interviewed regarded petitioner as sincere in his religious beliefs. Petitioner orally admitted to the hearing officer that he had only recently become more active in religious work. The Department of

Justice recommended that the claim for exemption be rejected (CMR 116, 117, 132–134).

On October 13, 1952, the appeal board classified petitioner as I–A. He was ordered to report for induction on December 11, 1952 but refused to submit to induction (CMR 84–85, 118–119).

Petitioner's file was reopened on May 3, 1955, and he was again classified I–A. Petitioner requested a personal appearance to reassert his claim to exemption as a minister and as a conscientious objector (CMR 85, 121–122). At his second appearance, petitioner was permitted to refute or explain, point by point, the adverse matters contained in the investigative report (CMR 125–126). The local board, however, adhered to the I–A classification on July 5, 1955. Petitioner appealed a second time and requested that he be furnished the complete F. B. I. report (CMR 85, 127–128).

At his second hearing before a hearing officer, it was shown that McFarland had been active in religious work for the preceding three years. Petitioner claimed there had been no change in his position as a conscientious objector. Although the hearing officer concluded that petitioner was not sincere in his claim, the Department of Justice disagreed, concluding that petitioner was sincerely opposed to combatant service and recommended that he be classified I–A–O, for noncombatant military training (CMR 129–131). A résumé of a second investigation made in 1955 disclosed nothing unfavorable to petitioner's claim of conscientious opposition to combatant military service (CMR 134–136).

Petitioner was given an opportunity to reply to the recommendation and stated merely that he did not agree with it. The appeal board classified him in I-A-O (CMR 137–139). He was ordered to report for induction on October 17, 1956. Petitioner reported as ordered but refused to submit to induction (CMR 20–21, 140–141).

Petitioner obtained a subpoena *duces tecum* for the complete F. B. I. report prior to trial but the subpoena was quashed on motion by the government (CMR 4–6).

b. After all of the evidence had been presented and before entering his findings, the trial judge delivered an oral opinion. He concluded that the burden was on petitioners Carnes and McFarland to establish their claimed exemptions, and that there was evidence to support the I–A classification of Carnes and the I-A-O classification of McFarland by the draft boards (CMR 155, 158–159). He held that under *United States* v. *Nugent*, 346 U. S. 1, and 18 U. S. C. (Supp. V) 3500, petitioners were not entitled to receive the entire investigative report, but only the résumé which they had received (CMR 154–158), stating in this connection (CMR 155–156):

> They have this résumé, which in these particular cases says that certain investigations were made * * *. Whether they knew who the people were that made those statements about them or not is after all not entirely material. They could rebut it by showing it was not true. * * * And so, he is not denied anything, he is

not denied an opportunity to make out his case * * *.

During the course of his oral opinion, the district judge noted that ministers of religion are not exempted as such because of personal reasons, but because of the service which they do for their congregations. At that point defense counsel interposed to say that petitioners Carnes and McFarland grounded their objection "on their conscientious objections to war, rather than to being a minister" (CMR 156). On appeal, the Court of Appeals affirmed for the reasons stated in the trial judge's oral opinion (CMR 170–172).

ARGUMENT

1. *a.* As to petitioners Liefer and McFarland, there is no issue as to the sincerity of their adherence to the tenets of their sect. Their classification as I–A–O constitutes a determination by the selective service boards that the petitioners do have sincere personal religious scruples against killing and "taking up carnal weapons" entitling them to exemption from bearing arms. The boards have found merely that their religious scruples against killing are not the reason for their refusal to do *non*combatant work. These two petitioners made clear, not once but many times, that they were unwilling to perform noncombatant military service—or indeed, any service of any sort—only because they were unwilling to interrupt their street-preaching and tract-distributing activities.

This objection to service is not recognized by the Universal Military Training and Service Act. *Tomlinson* v. *United States*, 216 F. 2d 12, 18 (C. A. 9), certiorari denied, 348 U. S. 970.[4] There was thus evidence to support the selective service classification. *Dickinson* v. *United States*, 346 U. S. 389, 396; *Estep* v. *United States*, 327 U. S. 114, 122.

b. As to petitioner Carnes, the trial court properly found that there was evidence from which the selective service boards could conclude that he did not have sincere scruples against killing. Carnes did not claim that he had such conscientious scruples when he completed his questionnaire in late January, 1953, although he later claimed that he had been studying the teachings of the Jehovah's Witnesses since October, 1952. The hearing officer who saw and interviewed this petitioner came to the conclusion that he was not sincere. The ultimate question with respect to petitioner Carnes is the same as that presented in *Witmer* v. *United States*, 348 U. S. 375. It "is the sincerity of the registrant in objecting, on religious grounds, to participation in war in any form. * * * [A]ny fact which casts doubt on the veracity of the registrant is relevant. * * * If, as here, the issue is the registrant's sincerity and good faith belief, then

[4] Certiorari was denied in the *Tomlinson* case two weeks after this Court had held in *Sicurella* v. *United States*, 348 U. S. 385, that belief in theocratic warfare and the use of force in self-defense is not inconsistent with religious scruples against killing.

there must be some inference of insincerity or bad faith" (348 U. S. at 381–382).[5]

The trial judge properly held that resolution of issues of sincerity and credibility was for the selective service authorities.

2. Since this Court's decision in *United States* v. *Nugent*, 346 U. S. 1, it has been settled that a registrant must be furnished by the hearing officer, upon request, a fair résumé of any unfavorable evidence against him, but that he is not entitled to see the investigative report or be informed of the names of persons interviewed by the investigator. *Simmons* v. *United States*, 348 U. S. 397, spelling out the requirements of a fair résumé, and *Gonzales* v. *United States*, 348 U. S. 407, holding that a registrant must be given a copy of the recommendation by the Department of Justice and afforded an opportunity to reply

[5] The claim by each petitioner that he was entitled to classification as a minister was essentially a statement of the position rejected by this Court in *Cox* v. *United States*, 332 U. S. 442, 444–446, that all members of Jehovah's Witnesses are ministers. Their files show that they were members of various groups of congregants who engaged in door-to-door and street religious observances, part-time Bible studies, the giving of occasional student discourses, and other similar group endeavors. They did not practice these activities as a "vocation" (*Dickinson* v. *United States*, *supra*, 346 U. S. at 395), nor were they in any sense leaders of a "religious faith" (*id.*, p. 394). Their roles appear to have been exactly the same as those of all other members of their religious company. Clearly they were not pastors or company servants. Their vocations were secular, as academic student or wage earner, and their earnings were for personal support, not to advance a ministry. Indeed, Carnes and McFarland waived this claim at trial (CMR 156).

to the recommendation, have not impinged upon the authority of *Nugent, supra.* The *Nugent* holding is therefore justification for the procedure followed in these cases.

The argument that the decision in *Jencks* v. *United States,* 353 U. S. 657, weakened the effect of *Nugent* has been rejected by the various Courts of Appeals in which that contention has been raised. *Blalock* v. *United States,* 247 F. 2d 615 (C. A. 4); *Bouziden* v. *United States,* 251 F. 2d 728, 730–732 (C. A. 10), certiorari denied, 356 U. S. 927. See the Government's brief in opposition in the *Bouziden* case, No. 804, October Term, 1957. The *Jencks* decision by its terms is applicable only to pretrial statements made by persons called as adverse witnesses by the prosecution during the course of trial. Since that decision, Congress has made even clearer by statute, 18 U. S. C. (Supp. V) 3500, that demand for production of F. B. I. reports must be based on the testimony of a witness at the trial.

The recommendation of the Department of Justice, which is itself merely advisory to the appeals board, cannot be deemed the equivalent of the testimony of a prosecution witness. The only question before the trial court to which the recommendation relates is whether there was basis in fact for the classification. Reports which are never given to the Selective Service Board cannot show that the Board acted arbitrarily.

There is a further reason for concluding that the demand for production of the F. B. I. reports raises no real issue in these cases. As to petitioners Leifer and Carnes, the résumé was entirely favorable to their claim of being conscientious objectors to killing. As to McFarland, those portions of the résumé which were unfavorable were not relied upon by the Department of Justice or the appeal board, since petitioner McFarland was found to be a sincere Jehovah's Witness. Each of the petitioners was given a résumé of the reports and each was given a copy of the Department of Justice recommendation and invited to comment thereon (see the Statement, *supra* pp. 9–10, 14, 19). Leifer did not reply; Carnes substantially admitted that the facts stated in the recommnedation were accurate, since he attempted to explain them and dispute the inferences drawn therefrom; and McFarland merely noted his objection to the recommendation. The issues as to the validity of the classifications do not turn on the F. B. I. reports.

CONCLUSION

The petition for a writ of certiorari presents essentially factual issues primarily dependent upon the specific circumstances of each case. The extensive administrative procedures which were followed have been carefully scrutinized by the courts below and found to be fair. There is no conflict of decision. It is therefore respectfully submitted that the petition should be denied.

J. LEE RANKIN,
Solicitor General.
MALCOM ANDERSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
EUGENE L. GRIMM,
Attorneys.

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OCTOBER TERM, 1958

No. 525

ARNOLD WILLIAM LEIFER,
GEORGE FREDERICK CARNES
and JOHN HENRY McFARLAND, Petitioners

v.

UNITED STATES OF AMERICA

Supplemental Memorandum Supporting Joint Petition for Writ of Certiorari

HAYDEN C. COVINGTON
124 Columbia Heights
Brooklyn 1, New York

Counsel for Petitioners

Supreme Court of the United States

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MAY IT PLEASE THE COURT:

At pages 20-21 of the joint petition it is argued that there is a conflict between the decisions below and the decisions cited at those pages in the joint petition on whether there is no basis in fact for the denial of the conscientious objector classification to the petitioners. The purpose of this memorandum is to call to the attention of the Court a

new decision that has been reported after the petition for writ was filed in these cases.—See *Batterton* v. *United States*, 260 F. 2d 233, 236-237 (8th Cir. 1958).

It is submitted that in each of these cases the petitioner made a prima facie case for classification as a conscientious objector, as was held in the case just cited. There is no contradictory evidence in the record of each case to justify the denial of the conscientious objector status by the appeal board. The holdings of the court below are diametrically opposed to and in conflict with the following language in *Batterton* v. *United States*, 260 F. 2d 233, 237 (8th Cir. 1958), where it is said: "It seems quite evident that mere disbelief is not enough, and that there must be some affirmative evidence to support the rejection of the claimed exemption, or something in the record which substantially blurs the picture painted by the registrant and casts doubt on his sincerity or the genuineness of his claim."

The conflict of decision between the court below and the Court of Appeals for the Eighth Circuit in *Batterton* v. *United States*, 260 F. 2d 233, is ground for the granting of the writ in these cases.

Respectfully submitted,

HAYDEN C. COVINGTON

124 Columbia Heights
Brooklyn 1, New York

Counsel for Petitioners

January, 1959.